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4 UNITED STATES DISTRICT COURT
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA
6 OAKLAND DIVISION

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 vs.

10 CHARLES GRADY MOYER,
11 ASSOCIATED FEE ADJUSTERS,
12 STEPHEN E. TRETTIN AND PAMELA J.
13 TRETTIN FAMILY TRUST, CYRUS
14 KILLEN, NINO GIANELLI, STATE
15 BOARD OF EQUALIZATION, WALLACE
16 KRESLEY, and F.J. SOLVIEN-MEGLIN,

17 Defendants.

Case No: C 07-00510 SBA

ORDER

16 The United States of America (“the Government”) commenced this action against
17 Charles Grady Moyer (“Moyer”) seeking to reduce his federal tax assessments to judgment
18 and to foreclose upon federal tax liens on Moyer’s property located at 243 Alicante Court,
19 Danville, California (the “Property”). The Court previously issued an Order of Sale
20 permitting the Government to sell the Property. In turn, Moyer filed Ex Parte Motion to Set
21 Aside Order of Sale. The parties, however, have reached an agreement regarding the sale
22 of the Property. Thus, the only dispute remaining is which lienor, the State Board of
23 Equalization (“Board of Equalization”) or First American Title Insurance Company (“First
24 American”), has priority to the proceeds from the lien sale. Dkt. 80, 81. Having read and
25 considered the papers submitted in connection with this matter, and being fully informed,
26 the Court finds that First American has lien priority over the Board of Equalization.¹

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28 ¹ The Court, in its discretion, finds this matter suitable for resolution without oral
argument. See Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

1 **I. BACKGROUND**

2 **A. PROCEDURAL SUMMARY**

3 The parties are familiar with the facts of this case, which are summarized briefly
4 herein only to the extent they are pertinent to the instant motion. On January 25, 2007, the
5 Government commenced this action against Moyer under 26 U.S.C. §§ 7401 and 7402
6 alleging that he owes at least \$169,045.59 in taxes and that it seeks to sell the Property to
7 satisfy that obligation. Dkt. 10 ¶¶ 1-2, 5. In addition to Moyer, the amended complaint
8 filed on August 22, 2007, names Associated Fee Adjusters, Stephen E. Trettin and Pamela
9 J. Trettin Family Trust (“Trettin”), Cyrus Killen, Nino Gianelli (“Gianelli”), State Board of
10 Equalization (“Board of Equalization”), Wallace Kresley and F.J. Soliven-Meglin as parties
11 who allegedly claim an interest in the Property. Dkt. 10 ¶¶ 6-12.²

12 On January 31, 2008, the Government and Moyer stipulated that a judgment “for the
13 tax periods ending March 31, 1992 and December 31, 1992 be entered against him and in
14 favor of the United States in the total amount of \$169,045.59, plus statutory interest and
15 additions from February 14, 2007 until paid.” Dkt. 28. The Court approved the stipulation
16 and conditionally dismissed the action. Dkt. 29, 31. After Moyer did not comply with the
17 terms of the settlement, the Court reopened the action at the request of the Government, the
18 Board of Equalization and Trettin. Dkt. 39. Subsequently, the Court granted the
19 Government’s unopposed motion for an Order of Sale, which permitted the Government to
20 sell the Property. Dkt. 47.

21 Moyer filed a motion to set aside the Order of Sale in which he argued, among other
22 things, that the sale of the Property would not generate any proceeds and therefore is barred
23 under 26 U.S.C. § 6331(j). The Court stayed the Order of Sale pending the submission of
24 further briefing by the parties. Dkt. 56. The parties have since reached a tentative
25 agreement in which Moyer has agreed to the sale of the Property. To that end, the parties
26 have requested a thirty-day time period to finalize and submit a stipulation for the sale of

27 ² Gianelli and the Trettin Trust subsequently assigned their liens to First American.
28 Dkt. 27, 46. By stipulation, the parties have jointly requested the joinder of Jon R. Vaught
as a party-defendant. Dkt. 97. The Court approves said request.

1 the Property in accordance with 26 U.S.C. § 7403. Dkt. 103.³ However, two of the
2 parties—the Board of Equalization and First American—cannot agree which of them has
3 priority to the sale proceeds from the Property. The Court, therefore, addresses this
4 remaining issue based on the supplemental briefing provided by both parties. Dkt. 80, 81,
5 84, 95.

6 **B. FACTS RELATING TO PRIORITY ISSUE**

7 Moyer assumed title to the Property in May 1976. Since that time, a number of
8 involuntary liens and deeds of trust have been recorded against the Property. Specifically,
9 in 1992, Gianelli obtained a judgment against Moyer in the sum of \$10,286.19, which he
10 recorded against the Property on April 18, 2001. He renewed the judgment in December
11 2002. First American purchased the judgment from Gianelli on December 6, 2007, which
12 it then filed with the Court on January 9, 2008. Dkt. 80-3 ¶ 7, Dkt. 27. Gianelli’s lien now
13 exceeds \$30,684.06, and continues to accrue interest. Dkt. 80-3 ¶ 8.

14 In the meantime, on or about May 1, 2001, Moyer filed a Chapter 11 bankruptcy
15 petition in the United States Bankruptcy Court for the Northern District of California. See
16 In re Charles Grady Moyer, N.D. Cal. Bankr. Ct., No. 01-42478. On March 11, 2002, the
17 Bankruptcy Court issued an order granting Moyer’s motion to obtain secured credit. Dkt.
18 80-1, Exs. 9 & 10. The Order states, in pertinent part, that: “Charles Moyer is allowed to
19 borrow no more than the sum of \$315,000.00 on a secured basis. *The lender who loans*
20 *Charles Moyer this amount shall be entitled to a senior lien on that certain real property*
21 *located at 243 Alicante Court, Danville, California.” Id.* (emphasis added). The Order
22 specifically states that the \$315,000 loan would be deemed senior to the three liens
23 previously recorded by the Board of Equalization. Id. at 2-3. Subsequently, the loan was
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27 ³ The parties have indicated that they are in the process of drafting a stipulation for
28 the sale of the Property, and that they are amenable to the conditional dismissal of the
action with the understanding that the Court retains the authority to enter such stipulation
upon its submission.

1 funded by Walnut Creek Mortgage & Investment Corporation (“WCMIC”) and secured by
2 a deed of trust recorded against the Property. Id. Ex. 11.⁴

3 In 2006, Moyer refinanced the Property with a \$555,000 loan funded by
4 Performance Mortgage Investors Fund, LLC (“Performance Mortgage”). Performance
5 Mortgage paid \$327,162.48 of the loan proceeds to WCMIC to satisfy the note held by
6 WCMIC. Dkt. 80-2 ¶¶ 1, 2, 10, 11. A deed of trust in the amount of \$555,000 was
7 recorded against the Property. Id. ¶ 6. Based on Moyer’s representations, it was
8 Performance Mortgage’s understanding that it would assume a first-priority lien position
9 upon paying off the prior lien held by WCMIC. Id. ¶ 4. Although its tax liens had been
10 recorded against the Property, the Board of Equalization’s liens were not paid due by
11 Cornerstone Title Company (“Cornerstone”), a subsidiary of First American which acted as
12 the escrow agent for the transaction.

13 In March 2006, Performance Mortgage assigned the promissory note and deed of
14 trust to Trettin. In turn, Trettin assigned the note and deed of trust to First American on
15 June 14, 2008. Dkt. 80-4 ¶ 9. Moyer is in default on the \$555,000 loan, and the payoff
16 demand is \$673,598.29. Dkt. 80-3 ¶ 10.⁵ First American contends that it is equitably
17 subrogated to the “superpriority” status conferred to WCMIC by virtue of the 2002
18 Bankruptcy Court order. The Board of Equalization counters that such Order is of “no
19 effect” and that First American cannot satisfy two of the five requirements for equitable
20 subrogation. The Court discusses these issues below.

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25 ⁴ The Order was issued pursuant to 11 U.S.C. § 364(d)(1), which provides, in part,
26 that “[t]he court, after notice and a hearing, may authorize the obtaining of credit or the
27 incurring of debt secured by a senior or equal lien on property of the estate that is subject to
a lien” This provision allows the bankruptcy court to “prime” the lien, meaning that
the lien has “superpriority.” See Suntrust Bank v. Den-Mark Const., Inc., 406 B.R. 683,
688 (E.D.N.C. 2009).

28 ⁵ The actual payoff likely is greater due to the continuing accrual of interest.

1 II. DISCUSSION

2 A. LEGAL OVERVIEW

3 Federal law determines the priority of competing liens on property on which there is
4 a federal tax lien. See Aquilino v. United States, 363 U.S. 509, 513 (1960) (citations
5 omitted); United States v. Acri, 348 U.S. 211, 213 (1955) (“The relative priority of the lien
6 of the United States for unpaid taxes is . . . always a federal question to be determined
7 finally by the federal courts.”). “[P]riority for purposes of federal law is governed by the
8 common-law principle that ‘the first in time is the first in right.’” U.S. By and Through
9 I.R.S. v. McDermott, 507 U.S. 447, 449 (1993) (internal quotation marks and citations
10 omitted). A tax lien arises automatically when the tax amount is assessed as owing, and it
11 has priority over most other liens, even if it is not recorded. See 26 U.S.C. § 6323; see
12 United States v. City of New Britain, 347 U.S. 81, 86 (1954) (“[T]he priority of each
13 statutory lien contested here must depend on the time it attached to the property in question
14 and became choate.”).

15 Equitable subrogation is a state law doctrine which “permits a person who pays off
16 an existing encumbrance to assume *the same priority position as the holder of that*
17 *encumbrance.*” Han v. United States, 944 F.2d 526, 528 (9th Cir. 1991) (emphasis added).
18 Under California law, equitable subrogation is generally appropriate where:

19 (1) the subrogee made the payment to protect his or her own
20 interest, (2) the subrogee did not act as a volunteer, (3) the
21 subrogee was not primarily liable for the debt paid, (4) the
22 subrogee paid off the entire encumbrance, and (5) subrogation
would not work any injustice to the rights of the junior
lienholder.

23 Mort v. United States, 86 F.3d 890, 893-894 (9th Cir. 1996). Equitable subrogation is a
24 broad equitable remedy and is not circumscribed by a narrow application of the
25 aforementioned factors. Id. Rather, the doctrine also applies “whenever one person, not
26 acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and
27 which in equity and good conscience should have been discharged by the latter.” Id.
28 (internal quotations or citations omitted).

1 **B. CONTENTIONS**

2 **1. The 2002 Bankruptcy Court Order**

3 First American contends that it is equitably subrogated to the lien priority accorded
4 to WCMIC under the terms of the 2002 Bankruptcy Court order. As discussed, that Order
5 granted Moyer the ability to obtain \$315,000 in financing, and importantly, provided that
6 the lender of such loan was entitled to priority over the Board of Equalization liens, among
7 others. The Board of Equalization now argues that the Bankruptcy Court’s Order has “no
8 effect” under 11 U.S.C. § 349(b) because the bankruptcy proceeding has been dismissed.
9 Dkt. 81 at 8. Section 349(b), which governs the effect of dismissal of a bankruptcy case,
10 states, in pertinent part, that “[u]nless the court, for cause, orders otherwise, a dismissal of
11 the case other than under section 742 of this title – [¶] . . . vacates any order, judgment, or
12 transfer ordered under section 522(i)(1), 542, 550, or 553 of this title” 11 U.S.C.
13 § 349(b)(2).

14 “The basic purpose of [Section 349(b)] is to undo the bankruptcy case, as far as
15 practicable, and to restore all property rights to the position in which they were found at the
16 commencement of the case.” In re Aheong, 276 B.R. 233, 239 (B.A.P. 9th Cir. 2002)
17 (internal quotation marks and citations omitted). However, § 349(b)(2) only applies to
18 orders or judgments specifically identified in that provision. See, e.g., In re Gardenhire,
19 209 F.3d 1145, 1152 (9th Cir. 2000) (holding that order issued under 11 U.S.C. § 502(b)(9)
20 was not affected by the dismissal of the bankruptcy action because it is not among the Code
21 provisions subject to § 349); In re Carraher, 971 F.2d 327, 328 (9th Cir. 1992) (jurisdiction
22 unaffected by dismissal of bankruptcy case where termination order was not within the
23 purview of § 349); In re Arneson, 282 B.R. 883, 891 n.3 (B.A.P. 9th Cir. 2002) (noting that
24 a discharge under 11 U.S.C. § 523 is “not on the list of automatically vacated judgments”).
25 The 2002 Order at issue was expressly predicated *on 11 U.S.C. § 364(d)(1)*. Dkt. 80-1.

1 Since § 364 not among the statutes listed in § 349(b), the aforementioned authorities
2 counsel the Court to conclude that such Order remains valid and binding.⁶

3 **2. Equitable Subrogation Factors**

4 Alternatively, the Board of Equalization contends that First American cannot meet
5 the first and fifth elements of an equitable subrogation claim; i.e., that the subrogee made
6 the payment to protect his or her own interest and that subrogation would not work any
7 injustice to the rights of the junior lienholder, respectively. Neither contention has merit.

8 **a) First Prong**

9 The first prong of the test for equitable subrogation requires a showing that the
10 putative subrogee satisfied a prior debt “to protect its own interest and not as a volunteer.”
11 Fireman’s Fund Ins. Co. v. Maryland Cas. Co., 65 Cal. App. 4th 1278, 1292 (1998). In this
12 case, Performance Mortgage paid the \$315,000 lien in 2006 when Moyer refinanced his
13 loan. According to the Board of Equalization, Performance Mortgage was acting as a
14 volunteer since it allegedly satisfied the WMCIC lien as a matter of “contractual
15 obligation.” Dkt. 81 at 11. However, the Ninth Circuit has recognized that California law
16 allows for equitable subrogation where a subrogee pays off a preexisting debt in order to
17 secure a deed of trust on the property. See Mort, 86 F.3d at 894 & n.2 (“A person who
18 lends money to pay off an encumbrance on property and secures the loan with a deed of
19 trust on that property is not a volunteer for purposes of equitable subrogation.”) (citing
20 Katsivalis v. Serrano Reconveyance Co., 70 Cal. App. 3d 200 (1977)). Thus, the Court
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26 ⁶ The Board of Equalization also argues that the Bankruptcy Court Order does not
27 confer priority to First American because the Order pertained only to Moyer’s \$315,000
28 loan through WCMIC, and not his subsequent loan of \$555,000 from Performance
Mortgage. Dkt. 81 at 8. This argument is misguided. First American is not claiming that
that it is entitled to lien priority to the entire \$555,000 loan, but rather, that is entitled to
priority as to the \$327,162.48 in connection with the pay-off of the \$315,000 loan.

1 rejects the Board of Equalization's contention that First American was acting as a
2 volunteer.⁷

3 ***b) Fifth Prong***

4 The fifth element of the equitable subrogation test provides that "[s]ubrogation must
5 not work any injustice to the rights of others." See Caito v. United Cal. Bank, 20 Cal. 3d
6 694, 704 (1978). The Board of Equalization claims that it is an "innocent creditor" and that
7 First American and Moyer will be unjustly enriched if First American is accorded lien
8 priority. This contention, however, is belied by the fact that the Board of Equalization has
9 been dilatory in seeking to protect any rights it has against the Property. Though the Board
10 of Equalization recorded tax liens in 1992 and 1993, such liens were based on tax liabilities
11 dating as far back as 1987. When the Bankruptcy Court elevated WCMIC's liens above
12 those of the Board of Equalization in 2002, the Board of Equalization took no action to
13 challenge that decision. Nor is there any evidence that the Board of Equalization made any
14 effort to foreclose on its liens prior to the entry of such Order. Thus, the possibility that the
15 Board of Equalization may now recover nothing once the Property is sold is entirely of its
16 own doing.

17 Equally without merit is the Board of Equalization's assertion that its liens were not
18 satisfied during Moyer's 2006 refinancing due to Cornerstone's alleged negligence in
19 failing to uncover the liens. The fact that prior liens were recorded against the Property
20 does not foreclose application of equitable subrogation, absent a showing that the party
21 seeking subrogation had actual knowledge of the other liens. Smith v. State Savings &
22 Loan Ass'n, 175 Cal. App. 3d 1092, 1098 (1985). Here, there is no evidence of actual

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24 ⁷ United States v. Finch, No. CV 07 3317, 2008 U.S. Dist. LEXIS 1239 (C.D. Cal.
25 Jan. 7, 2008) is distinguishable. In that case, the lender seeking equitable subrogation
26 refinanced its own loan which was already secured by a deed of trust. In other words, the
27 lender paid off the initial loan in exchange for the debtor's renewed indebtedness to the
28 same lender. It was for that reason that the district court ruled that the lender was not
protecting its own interest when refinancing the existing debt. In contrast, Performance
Mortgage was not refinancing its own loan to Moyer and had no existing interest in the
Property. Thus, Performance Mortgage did not pay off an existing lien in exchange for a
renewed indebtedness by Moyer, as was the case in Finch. To the contrary, Performance
Mortgage paid off the WCMIC loan to ensure its first lien against the Property.

1 knowledge on the part of First American or its subsidiary Cornerstone. The Board of
2 Equalization's unsupported assertion that Cornerstone *should have* discovered the existence
3 of its liens is tantamount to a claim that constructive knowledge automatically precludes
4 equitable subrogation—which plainly is not the law in California. See Lawyers Title Ins.
5 Corp. v. Feldsher, 42 Cal. App. 4th 41, 47 (1996) (noting that the California Supreme Court
6 has “rejected the contention constructive knowledge of an intervening lien operated as a bar
7 to equitable subrogation”) (citing Darrough v. Herbert Kraft Co. Bank, 125 Cal. 272
8 (1899)). In sum, the Board of Equalization has failed to persuade the Court that it, or any
9 other party, will suffer an injustice if First American holds the lien in first position against
10 the Property.

11 **III. CONCLUSION**

12 For the reasons set forth above,

13 IT IS HEREBY ORDERED THAT:

14 1. Defendant Moyer's Ex Parte Motion to Set Aside Order of Sale Entered July
15 7, 2008 is DENIED (Dkt. 50) is without prejudice. The parties shall have until November
16 4, 2011 to file a stipulation and proposed order for the sale of the Property.

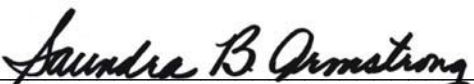
17 2. Jon R. Vaughn is joined as party-defendant in this action.

18 3. The Court finds that First American holds a first lien position in the amount
19 of \$327,162.48 against the Property.

20 4. There being no further issue remaining for the Court's determination, the
21 instant action and all claims asserted herein are dismissed with prejudice, except the Court
22 reserves the right to enter a stipulated order of sale. In the event that a stipulation for the
23 sale of the Property is not reached, any party may request to Court to reopen the action and
24 to schedule a Case Management Conference forthwith, provided that such request is filed
25 with the Court within 60 days of the date this Order is filed. The Clerk shall close the file.

26 IT IS SO ORDERED.

27 Dated: September 29, 2011

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SAUNDRA BROWN ARMSTRONG
United States District Judge